

**ATTACHMENT TO:**

**United States'**  
***Notice of Lodging of Proposed Consent Decree***  
***Pending Solicitation of Public Comment***

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2:08-cv-82-FtM-JES-DNF
	)	
DAVID ARP and	)	
TRIPLE DIAMOND ENTERPRISES, LLC	)	
	)	
Defendants.	)	
	)	

**CONSENT DECREE**

WHEREAS, the Plaintiff, the United States of America, on behalf of the U.S. Army Corps of Engineers ("Corps"), has filed a Complaint herein against Defendants David Arp and Triple Diamond Enterprises, LLC (collectively, "Defendants"), alleging that Defendants violated Sections 301(a) and 404 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a) and 1344 and Section 10 of the Rivers and Harbors Act of 1899 ("RHA"), 33 U.S.C. § 403; and

WHEREAS, the Complaint alleges that Defendants violated RHA Section 10 by altering the condition of a navigable waterway without Corps authorization and violated CWA §§ 301(a) and 404 by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States at a single site located in Englewood, Charlotte County, Florida (the "Site") and more fully described in the Complaint, without authorization by the Corps; and

WHEREAS, the Complaint seeks to (1) enjoin the discharge of pollutants into waters of the United States in violation of CWA §§ 301(a) and 404, 33 U.S.C. §§ 1311(a) and 1344, (2) require Defendants, at their own expense and at the direction of Corps, to mitigate the damages caused by their unlawful activities, and (3) require Defendants to pay civil penalties as provided in 33 U.S.C. § 1319(d); and

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' claims under the CWA and under the RHA set forth in the Complaint regarding the Site; and

WHEREAS, the United States and Defendants agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the United States' claims under the CWA and the RHA against Defendants in this case; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the United States' claims against Defendants in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

#### **I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the subject matter of this action and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

2. Venue is proper in the Middle District of Florida pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because the Defendants conduct business in this District, the subject property is located in this District, and the causes of action alleged herein arose in this District.

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, 309 and 404 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1344.

## **II. APPLICABILITY**

4. The obligations of this Consent Decree shall apply to and be binding upon Defendants and any person, firm, association, or corporation who is, or will be, acting in concert or participation with either or both Defendants, whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against any Defendant, said Defendant shall not raise as a defense the failure of any person or entity identified in this paragraph to take any actions necessary to comply with the provisions hereof.

5. The transfer of ownership or other interest in the Site shall not alter or relieve Defendants of their obligation to comply with all of the terms of this Consent Decree. At least fifteen (15) days prior to the transfer of ownership or other interest in the Site, the party making such transfer shall provide written notice and a true copy of this Consent Decree to its successors in interest and shall simultaneously notify the Corps and the United States Department of Justice at the addresses specified in Section X below that such notice has been given. As a condition to any such transfer, the party making the transfer shall reserve all rights necessary to comply with the terms of this Consent Decree.

## **III. SCOPE OF CONSENT DECREE**

6. This Consent Decree shall constitute a complete and final settlement of all civil and equitable claims for injunctive relief and civil penalties alleged in the Complaint against the Defendants under CWA §§ 301 and 404 and RHA § 10.

7. It is the express purpose of the parties in entering this Consent Decree to further the objectives set forth in CWA § 101, 33 U.S.C. § 1251. All plans, mitigation activities, and other obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing Defendants to achieve and maintain full compliance with, and to further the purposes of, the CWA and the RHA.

8. Defendants' obligations under this Consent Decree are joint and several.

9. Except as in accordance with this Consent Decree, Defendants are enjoined from discharging any pollutant into waters of the United States or navigable waters, unless such discharge complies with the provisions of the CWA, the RHA, and applicable implementing regulations.

10. Pursuant to the authorization in Nationwide Permit 32 ("Nationwide Permit"), found at 72 Fed. Reg. 11,187 (March 12, 2007), the following discharges of dredged or fill material shall be allowed: (1) those discharges of dredged or fill material specifically reflected on the Location Map, Site Plan and Wetland Restoration/Enhancement Area Planting Plan dated January 2006 (attached hereto as Exhibit A and incorporated herein by reference), (2) such other discharges as may be necessary to complete the Defendants' obligations pursuant to this Consent Decree, and (3) any discharges that may be necessary to meet the Defendants' affirmative obligations in Southwest Florida Water Management District Environmental Resource Permit No. 44026926.000, issued on March 11, 2005, and as modified by letters dated August 9, 2006 and August 17, 2006 (attached hereto as Composite Exhibit B and incorporated herein by reference). Within thirty (30) days from the date of this Consent Decree, the Corps shall provide the Defendants written affirmation that the above discharges are authorized by the Nationwide Permit, as reflected in the attached Exhibit C. Any discharges allowed pursuant to the prior sentences shall be subject to the conditions of the Nationwide Permit and this Consent Decree. All other discharges on the Site shall be removed and restored as set forth in Part IV.B of this Consent Decree.

11. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to §§ 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, § 10 of the RHA, 33 U.S.C. § 403, or any other law. Nothing in this Consent Decree shall limit the ability of the Corps to issue, modify, suspend, revoke, or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree

limit the United States Environmental Protection Agency's ability to exercise its authority pursuant to § 404(c) of the CWA, 33 U.S.C. § 1344(c).

12. This Consent Decree in no way affects or relieves Defendants of their responsibility to comply with any applicable federal, state, or local law, regulation, or permit.

13. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

14. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

15. Nothing in this Consent Decree shall constitute an admission of fact or law by the United States or the Defendants. Likewise, nothing in this Consent Decree shall constitute an admission by Defendants of any allegation or claim included in the Complaint filed in this action.

#### **IV. SPECIFIC PROVISIONS**

##### **A. CIVIL PENALTIES**

16. Defendants shall pay a civil penalty to the United States in the amount of Three Hundred Thousand Dollars (\$300,000.00) pursuant to 33 U.S.C. § 1319 to address all violations of the Clean Water Act cited in the Complaint herein, which shall be due and payable within thirty (30) days of entry of this Consent Decree. If for any reason payment is not made within said thirty (30) day period, interest shall be charged in accordance with the statutory judgment interest rate, as provided in 28 U.S.C. § 1961, until the date payment is made.

17. Defendants shall make the above-referenced payment by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing the DOJ case number (90-5-1-1-17895). Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's Office for the Middle District of Florida. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

18. Upon payment of the civil penalty required by this Consent Decree, Defendants shall provide written notice, at the addresses specified in Section X of this Consent Decree that such payment was made in accordance with Paragraph 17.

19. Civil penalty payments pursuant to this Consent Decree (including stipulated penalty payments under Section IX) are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21. Penalty payments are not tax deductible expenditures for purposes of federal law.

#### **B. MITIGATION**

20. Defendants shall perform and complete mitigation projects at the Site under the terms and conditions stated in Exhibits A, B, C, and the Cape Haze Dockside Wetland Mitigation Proposal and attachments dated March 23, 2006 (attached hereto as Exhibit D and incorporated herein by reference). Specifically, Defendants shall perform the following obligations:

a. Within ninety (90) days from the date of entry of this Consent Decree, Defendants shall (1) grade or regrade the Site to the elevations shown on Exhibit A, including removal of any existing discharges not specifically authorized by Exhibit A, (2) remove all nuisance/exotic vegetation from the areas identified thereon as wetland enhancement areas or as wetland restoration areas, (3) remove any obstructions or restrictions to the hydrological connection between the Wetland Enhancement/Restoration Area on the Site and the offsite wetlands to the west of the Site, and (4) complete the replanting of the Wetland Enhancement/Restoration Areas pursuant to the planting key in Exhibit A; and

b. Defendants shall monitor and maintain the above Wetland Enhancement/Restoration area for coverage of native vegetative cover and coverage of nuisance or exotic species. Monitoring shall begin sixty days from the date of entry of this Consent Decree and shall terminate when monitoring demonstrates that the area has successfully maintained 85% aerial coverage of native hydrophytic vegetative cover, and no

more than 5% coverage nuisance or exotic species as defined by Chapter 5B-57.007, as revised, of the Florida Administrative Code, Florida Department of Agricultural and Consumer Services, for one (1) full year without intervention. A baseline monitoring event to document the enhancement and restoration activities will be accomplished within sixty (60) days from the date of entry of this Consent Decree, including photographs taken from fixed-point photo stations, quantities and species of existing plants, and a qualitative description of the condition of the areas, including hydrology. Defendants shall then submit regular monitoring reports every six (6) months thereafter so long as the monitoring obligation shall continue. Each regular monitoring report shall include photographs taken from fixed-point photo stations, quantities and species of plants present in the enhanced/restored areas, and a qualitative and quantitative description of coverage by wetland, upland, and nuisance vegetation, a description of hydrology, and documentation of any maintenance performed during the monitoring period. Percentages of native cover and/or nuisance and exotic species shall be determined by agreed transect or by an average of random sampling plots; and

c. Defendants shall, within sixty (60) days from the date of entry of this Consent Decree, record in the public records of Charlotte County the declaration of restrictive covenants (attached hereto as Exhibit E and incorporated herein by reference) requiring perpetual maintenance of the lands referenced in Exhibit A as Wetland Enhancement/Restoration areas so as to continually achieve the success criteria of 85% aerial coverage of native vegetative cover and no more than 5% coverage of nuisance or exotic species. The maintenance and monitoring obligations shall be binding on Defendants as well as Defendants' successors in title; and

d. Within 60 days from the date of entry of this Consent Decree, Defendants shall purchase 0.8 mitigation credits in the Little Pine Island Mitigation Bank and provide evidence of such acquisition to the Corps.



21. Within 90 days from the date of entry of this Consent Decree, Defendants shall complete removal and restoration of the boat ramp in accordance with Specific Condition 13 of Exhibit B.

22. Defendants shall not use any boat slip or mooring, regardless of duration, adjacent to any existing pier, dock or marginal wharf structure within the Site, and Defendants shall prohibit all others from doing so. Specifically, Defendants shall ask any third party who may use any such boat slip or mooring to leave, and if said third party thereupon fails or refuses to do so, Defendants shall immediately report the third party to the appropriate law enforcement agency for trespass. Within ten (10) days after making any such report to a law enforcement agency, Defendants shall notify the Corps in writing of the report and the results thereof. Notwithstanding the foregoing, however, Defendants and their designees may install and use boat lifts associated with existing finger piers in compliance with Permit Specific Condition 10 of Exhibit B, if Defendants first apply for and receive a Department of the Army permit for installation of said boatlifts. Any such permit is not within the scope of this Consent Decree, and the Corps expresses no opinion regarding whether such permits would or would not be granted or the terms of such a permit, if granted.

23. At such time as all required mitigation has been completed, the Corps shall inspect such restoration/mitigation and either (1) accept such restoration/mitigation or (2) notify Defendants as to what matters are not in accordance with the restoration / mitigation plans and the requirements necessary to comply with the plans in order that the Corps shall accept such restoration/mitigation. Within thirty (30) days after notice from the Corps, Defendants shall take all action necessary to correct any deficiencies with the restoration/mitigation plans, provided that, if Defendants believe that some or all of the actions identified by the Corps are not necessary to correct alleged deficiencies, Defendants may invoke the Dispute Resolution provision of Section VII of the Consent Decree and shall not be required to take any action in dispute pending final resolution thereunder.

24. Upon completion of the terms and conditions of this Consent Decree, Defendants shall not mow, cut, clear, cultivate, dredge, excavate, farm, fill, dewater, drain or otherwise disturb in any manner whatsoever any land identified in Exhibit A as a Wetland Enhancement/Restoration Area except to maintain or restore said Wetland Enhancement/Restoration Area or except as may be specifically authorized in writing by the Corps. The terms of this paragraph shall continue in perpetuity and shall survive termination of this Consent Decree.

25. To ensure that the Site remains undisturbed, Defendants shall, within fifteen (15) days of entry of this Consent Decree, record a certified copy of this Consent Decree with the Circuit Clerk of Charlotte County, Florida, and shall, within sixty (60) days thereafter, provide the Corps with a copy of this Consent Decree with an official stamp from the Clerk's office indicating the date, book, and page of recording. Thereafter, each deed, title, or other instrument conveying an interest in the Site shall contain a notice stating that the property is subject to this Consent Decree and shall reference the recorded location of the Consent Decree and any restrictions applicable to the property under this Consent Decree.

#### **V. NOTICES AND OTHER SUBMISSIONS**

26. Within thirty (30) days after the deadline for completing any task or obligation set forth in this Consent Decree, Defendants shall provide the United States with written notice, at the addresses specified in Section X of this Consent Decree, of whether or not that task has been completed.

27. If the required task has been completed, the notice shall specify the date when it was completed, and explain the reasons for any delay in completion beyond the scheduled time for such completion required by the Consent Decree.

28. In all notices, documents, or reports submitted to the United States pursuant to this Consent Decree, the Defendants shall, by signature of a senior management official, certify such notices, documents, and reports as follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

## **VI. RETENTION OF RECORDS AND RIGHT OF ENTRY**

29. Until five (5) years after entry of this Consent Decree, Defendants shall preserve and retain all records and documents now in their possession or control or which come into their possession or control that relate in any manner to the performance of the tasks in Appendices i, ii, and iii regardless of any corporate retention policy to the contrary. Until five (5) years after entry of this Consent Decree, Defendants shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature, or description relating to the performance of the tasks or obligations set forth in this Consent Decree and/or any Exhibit hereto.

30. At the conclusion of the document retention period, Defendants shall notify the United States at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by the United States, Defendants shall deliver any such records or documents to Corps. The Defendants may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Defendants assert such a privilege, they shall provide the United States with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

31. Right of Entry:

a. Until termination of this Consent Decree, the United States and its authorized representatives and contractors shall have authority at all reasonable times to enter the Defendants' premises to:

1. Monitor the activities required by this Consent Decree,
2. Verify any data or information submitted to the United States,
3. Obtain samples,
4. Inspect and evaluate Defendants' mitigation activities, and
5. Inspect and review any records required to be kept under the terms and conditions of this Consent Decree and the CWA.

b. This provision of this Consent Decree is in addition to, and in no way limits or otherwise affects, the statutory authorities of the United States to conduct inspections, to require monitoring, and to obtain information from the Defendants as authorized by law.

**VII. DISPUTE RESOLUTION**

32. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and Defendants affected by the dispute to attempt to resolve such dispute. The period for informal negotiations shall not extend beyond thirty (30) days beginning with written notice by one party to the other affected party or parties that a dispute exists, unless agreed to in writing by those parties. If a dispute between the United States and Defendants cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within fourteen (14) days after the end of the informal negotiations period, the Defendants file a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have thirty (30) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a

preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, the CWA, and/or the RHA, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree, the CWA, and/or the RHA.

33. If the United States believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the thirty (30) day period for informal negotiations. The Defendants shall have fourteen (14) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree, the CWA, and/or the RHA.

34. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendants under this Consent Decree, except as provided in Paragraph 40 below regarding payment of stipulated penalties.

#### **VIII. FORCE MAJEURE**

35. Defendants shall perform the actions required under this Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events which constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the control of Defendants, including their employees, agents, consultants, and contractors, which could not be overcome by due diligence and which delays or prevents the performance of an action required by this Consent Decree within the specified time period. A Force Majeure event does not include, *inter alia*, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate events, changed circumstances arising out of the sale, lease, or other transfer or

conveyance of title or ownership or possession of a site, or failure to obtain federal, state, or local permits.

36. If Defendants believe that a Force Majeure event has affected Defendants' ability to perform any action required under this Consent Decree, Defendants shall notify the United States in writing within seven (7) calendar days after the event at the addresses listed in Section X. Such notice shall include a discussion of the following:

- a. what action has been affected,
- b. the specific cause(s) of the delay,
- c. the length or estimated duration of the delay, and
- d. any measures taken or planned by the Defendants to prevent or minimize the delay and a schedule for the implementation of such measures.

Defendants may also provide to the United States any additional information that they deem appropriate to support their conclusion that a Force Majeure event has affected their ability to perform an action required under this Consent Decree. Failure to provide timely and complete notification to the United States shall constitute a waiver of any claim of Force Majeure as to the event in question.

37. If the United States determines that the conditions constitute a Force Majeure event, then the deadline for the affected action shall be extended by the amount of time of the delay caused by the Force Majeure event. Defendants shall coordinate with the Corps to determine when to begin or resume the operations that had been affected by any Force Majeure event.

38. If the parties are unable to agree whether the conditions constitute a Force Majeure event, or whether the length of time for fulfilling the provision of the Consent Decree at issue should be extended, any party may seek a resolution of the dispute under the procedures in Section VII of this Consent Decree.

39. Defendants shall bear the burden of proving (1) that the noncompliance at issue was caused by circumstances entirely beyond the control of Defendants and any entity

controlled by Defendants, including their contractors and consultants; (2) that Defendants or any entity controlled by Defendants could not have foreseen and prevented such noncompliance; and (3) the number of days of noncompliance that were caused by such circumstances.

#### **IX. STIPULATED PENALTIES**

40. After entry of this Consent Decree, if Defendants fail to timely fulfill any requirement of the Consent Decree (including any requirements set forth in Appendices i-iii herein), the Defendants shall pay a stipulated penalty to the United States for each violation of each requirement of this Consent Decree as follows:

- |    |   |                    |
|----|---|--------------------|
| a. | For Day 1 up to and including<br>Day 30 of non-compliance | \$1000.00 per day  |
| b. | For Day 31 up to and including<br>60 of non-compliance    | \$2,000.00 per day |
| c. | For Day 61 and beyond<br>of non-compliance                | \$3,000.00 per day |

Such payments shall be made without demand by the United States on or before the last day of the month following the month in which the stipulated penalty accrued.

41. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to the Dispute Resolution provisions in Section VII and/or the Force Majeure provisions in Section VIII shall be resolved upon motion to this Court as provided in Paragraphs 32 and 33.

42. The filing of a motion requesting that the Court resolve a dispute shall stay Defendants' obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree. In the event that Defendants do not prevail on the disputed issue, stipulated penalties shall be paid by Defendants as provided in this Section.



43. To the extent Defendants demonstrate to the Court that a delay or other non-compliance was due to a Force Majeure event (as defined in Paragraph 35 above) or otherwise prevail on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.

44. In the event that a stipulated penalty payment is applicable and not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

45. Defendants shall make any payment of a stipulated penalty by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing the DOJ case number (90-5-1-1-17895). Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's Office for the Middle District of Florida. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Defendants shall provide written notice, at the addresses specified in Section X of this Decree.

#### **X. ADDRESSES**

46. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

a. TO THE UNITED STATES DEPARTMENT OF JUSTICE

Todd W. Gleason, Trial Attorney  
United States Department of Justice  
Environment and Natural Resources Division, Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986

b. TO THE CORPS:

Mr. Eric Summa



Chief, Enforcement Section  
United States Army Corps of Engineers  
701 San Marco Boulevard  
Jacksonville, FL 32207-8175

John Kasbar  
Assistant District Counsel  
United States Army Corps of Engineers  
701 San Marco Boulevard  
Jacksonville, FL 32207

c. TO DEFENDANTS AND COUNSEL:

Mr. David Arp  
6039 Manasota Key Road  
Englewood, FL 34223

Steven Burton, P.A.  
Mark Barber, Esq.  
Broad and Cassel  
Counsel for Defendant David Arp  
100 North Tampa Street, Suite 3500  
Tampa, FL 33602

Triple Diamond Enterprises, LLC  
Attn: Paul Hostetler  
P.O. Box 1967  
Nokomis, FL 34275

#### **XI. COSTS OF SUIT**

47. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action. Should Defendants subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, Defendants shall be jointly and severally liable for any costs or attorneys' fees incurred by the United States in any action against Defendants for noncompliance with or enforcement of this Consent Decree.

#### **XII. PUBLIC COMMENT**

48. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose

facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The Defendants agree not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified the Defendants in writing that it no longer supports entry of the Consent Decree.

### **XIII. CONTINUING JURISDICTION OF THE COURT**

49. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or entry of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

### **XIV. MODIFICATION**

50. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by both the United States and the Defendants and approved by the Court.

### **XV. TERMINATION**

51. Except for paragraph 22, this Consent Decree may be terminated by either of the following:

a. Defendants and the United States may at any time make a joint motion to the Court for termination of this Decree or any portion of it; or

b. Defendants may make a unilateral motion to the Court to terminate this Decree after each of the following has occurred:

1. Defendants have obtained and maintained compliance with all provisions of this Consent Decree and the CWA for twelve (12) consecutive months;
2. Defendants have paid all penalties and other monetary obligations hereunder and no penalties or other monetary obligations are outstanding or owed to the United States;

3. Defendants have certified compliance pursuant to subparagraphs 1 and 2 above to the Court and all Parties; and

4. Within forty-five (45) days of receiving such certification from the Defendants, the Corps has not contested in writing that such compliance has been achieved. If the Corps disputes Defendants' full compliance, this Consent Decree shall remain in effect pending resolution of the dispute by the Parties or the Court.

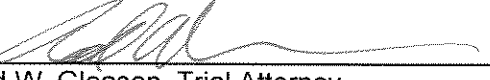
**IT IS SO ORDERED.**

Dated and entered this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

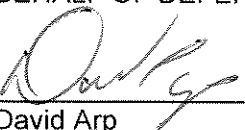
\_\_\_\_\_  
United States District Judge

ON BEHALF OF THE UNITED STATES:


RONALD J. TENPAS  
Assistant Attorney General  
Environmental and Natural Resources Division

By:  Dated: 1/12/08  
Todd W. Gleason, Trial Attorney  
Environmental and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986

ON BEHALF OF DEFENDANTS:

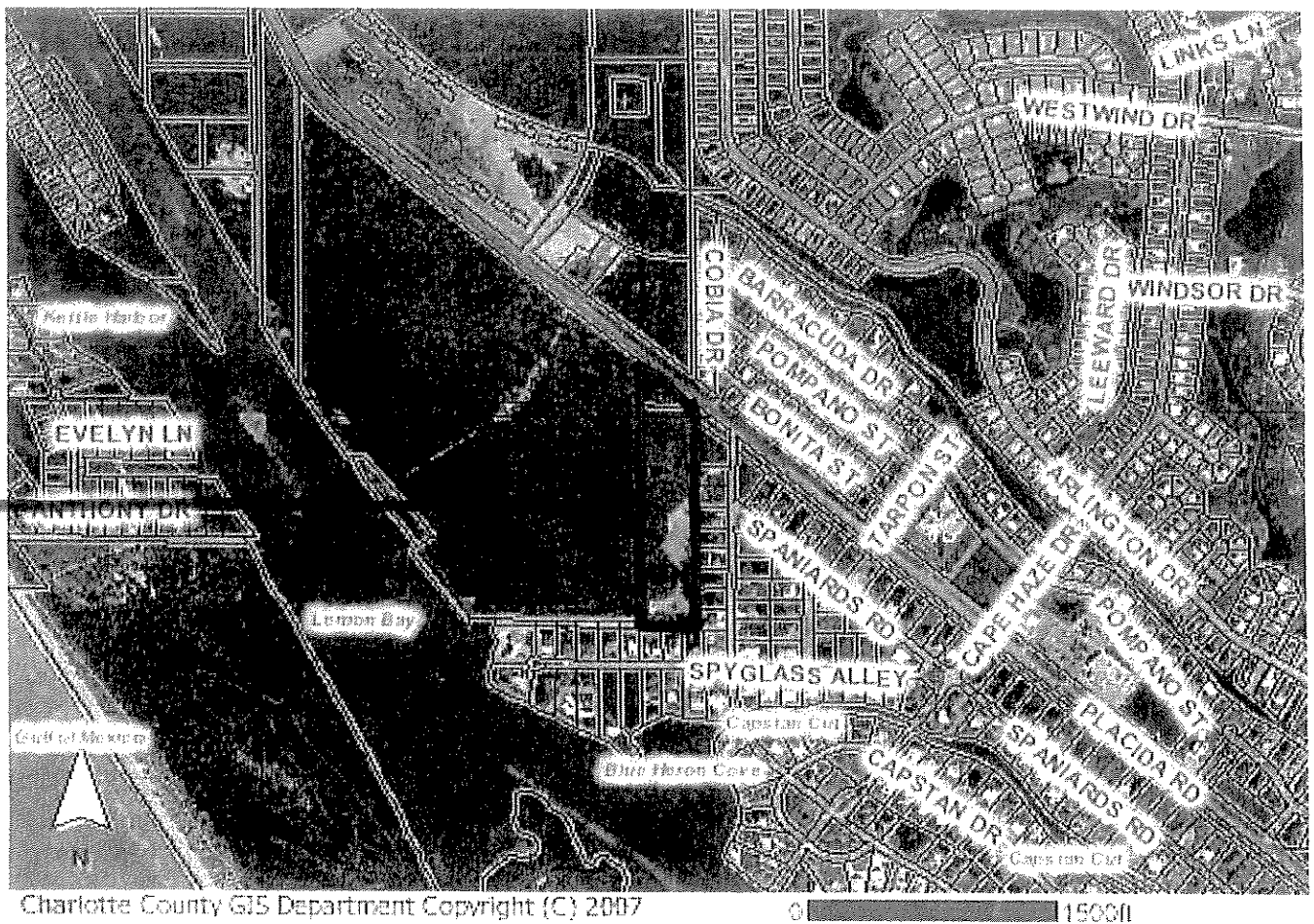
 Dated: 1-2-08  
Mr. David Arp  
6039 Manasota Key Road  
Englewood, FL 34223

and

 Dated: 1/02/08  
Paul Hostettler, Manager  
Triple Diamond Enterprises, LLC  
P.O. Box 1967  
Nokomis, FL 34275

## **Exhibit A**

**Location Map, Site Plan and Wetland  
Restoration/Enhancement Area  
Planting Plan dated January 2006**

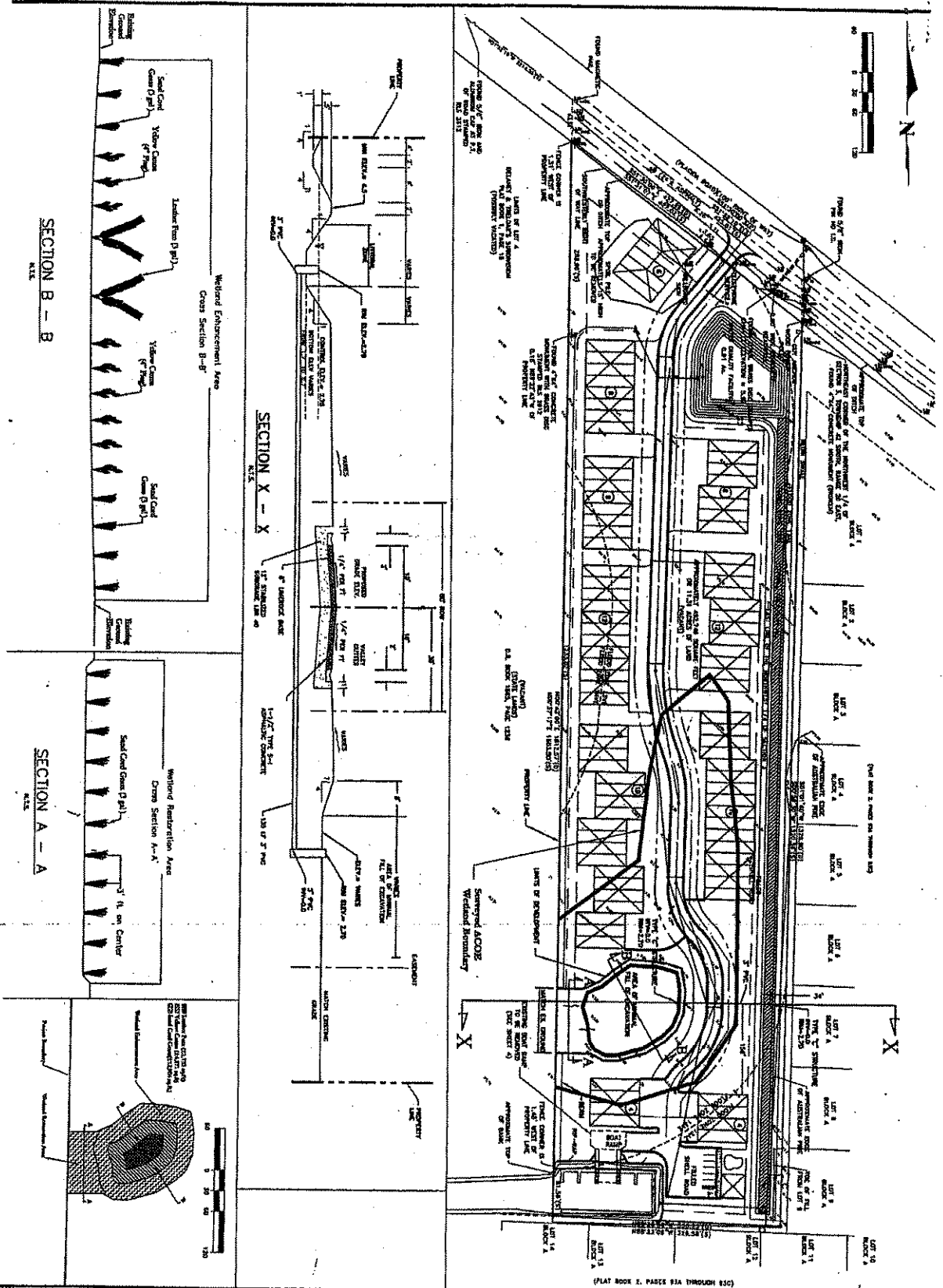


Location Map

Englewood, FL



# WETLAND RESTORATION/ENHANCEMENT AREA PLANTING PLAN (JANUARY 2006)



<p>COASTAL ENGINEERING CONSULTANTS, INC. 3108 S. Horseshoe Drive Naples, Florida 34104</p>	<p>Client: PETER JOHNSON Project: CAPE HAZE SITE DEVELOPMENT PLAN</p>	<p>Drawn: [Name] Checked: [Name] Scale: 1" = 100'</p>	<p>DATE: 1/1/06 BY: [Name]</p>	<p>REVISIONS</p>	<p>COASTAL ENGINEERING CONSULTANTS, INC. 3108 S. Horseshoe Drive Naples, Florida 34104 Phone: (239) 441-2121 Fax: (239) 441-1111 www.coastal-engineering.com E-Mail: enginfo@ceci.com</p>
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## **Exhibit B**

**Southwest Florida Water  
Management District Environmental  
Resource Permit No. 44026926.000,  
issued on March 11, 2005, and as  
modified by letters dated August 9,  
and August 17, 2006**



Nov. 1, 2007 2:22 PM

No. 0022 P. 2



As Equal  
Opportunity  
Employer

## Southwest Florida Water Management District

**Bartow Service Office**  
170 Century Boulevard  
Bartow, Florida 33830-7700  
(863) 834-1449 or  
1-800-492-7882 (FL only)  
SUNCOM 872-6200

**Lacanta Service Office**  
3600 West Sovereign Path  
Suite 226  
Lacanta, Florida 34481-8070  
(352) 827-8131  
SUNCOM 687-3271

2379 Broad Street, Brooksville, Florida 34604-6899  
(352) 796-7211 or 1-800-423-1478 (FL only)  
SUNCOM 628-4150 TDD only 1-800-231-6103 (FL only)  
On the Internet at: [WaterMatters.org](http://WaterMatters.org)

**Sarasota Service Office**  
6750 Franchise Road  
Sarasota, Florida 34240-9711  
(941) 377-3722 or  
1-800-320-3503 (FL only)  
SUNCOM 530-6900

**Tampa Service Office**  
7801 Highway 301 North  
Tampa, Florida 33637-6759  
(813) 985-7461 or  
1-800-638-0797 (FL only)  
SUNCOM 578-2070

William L. Reynolds II  
Chair, Pinellas  
David B. McGraw  
Vice Chair, Hillsborough  
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Pinellas  
Ronald C. Johnson  
Polk  
Janet D. Karsch  
Hillsborough  
Patry G. Symons  
DeSoto

David L. Moore  
Executive Director  
Gene A. Heath  
Assistant Executive Director  
William E. Stenby  
General Counsel

March 11, 2005

Mr. Peter Johnson  
25 Cape Haze Drive  
Placida, FL 33946

Subject: Final Agency Action Transmittal Letter  
ERP General Construction  
Permit No.: 44028928.000  
Project Name: Cape Haze Dockside  
County: Charlotte  
Sec/Twp/Rge: 34/41S/20E and 3/42S/20E

FILE OF RECORD

Dear Mr. Johnson:

This letter constitutes notice of Final Agency Action for approval of the permit referenced above. Final approval is contingent upon no objection to the District's action being received by the District within the time frames described below.

You or any person whose substantial interests are affected by the District's action regarding a permit may request an administrative hearing in accordance with Sections 120.569 and 120.57, Florida Statute (F.S.), and Chapter 28-106, Florida Administrative Code (F.A.C.), of the Uniform Rules of Procedure. A request for hearing must: (1) explain how the substantial interests of each person requesting the hearing will be affected by the District's action, or proposed action, (2) state all material facts disputed by the person requesting the hearing or state that there are no disputed facts, and (3) otherwise comply with Chapter 28-106, F.A.C. Copies of Sections 28-106.201 and 28-106.301, F.A.C. are enclosed for your reference. A request for hearing must be filed with (received by) the Agency Clerk of the District at the District's Brooksville address within 21 days of receipt of this notice. Receipt is deemed to be the fifth day after the date on which this notice is deposited in the United States mail. Failure to file a request for hearing within this time period shall constitute a waiver of any right you or such person may have to request a hearing under Sections 120.569 and 120.57, F.S. Mediation pursuant to Section 120.573, F.S., to settle an administrative dispute regarding the District's action in this matter is not available prior to the filing of a request for hearing.

Enclosed is a "Noticing Packet" that provides information regarding the District Rule 40D-1.1010, F.A.C., which addresses the notification of persons whose substantial interests may be affected by the District's action in this matter. The packet contains guidelines on how to provide notice of the District's action, and a notice that you may use.

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Permit No.: 44028926.000

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March 11, 2005

The enclosed approved construction plans are part of the permit, and construction must be in accordance with these plans.

If you have questions concerning the permit, please contact Daryl R. Flatt, P.E., at the Sarasota Service Office, extension 6506. For assistance with environmental concerns, please contact Richard R. Repperger, extension 6536.

Sincerely,



James P. Guida, P.G., Director  
Sarasota Regulation Department

JPG:DRF:RXR:bxm

Enclosures: Approved Permit w/Conditions Attached  
Approved Construction Drawings  
Statement of Completion  
Notice of Authorization to Commence Construction  
Noticing Packet (42.00-039)  
Sections 28-106.201 and 28-106.301, F.A.C.

cc/enc: File of Record 44028926.000

Lucy Blair, FDEP  
Clayton R. Miller, P.E., Coastal Engineering Consultants, Inc.  
MaryBeth McNeil  
David Levin, Icard Merrill

SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT  
ENVIRONMENTAL RESOURCE  
GENERAL CONSTRUCTION  
PERMIT NO. 44026926.000

**Expiration Date: March 11, 2010**

**PERMIT ISSUE DATE: March 11, 2005**

This permit is issued under the provisions of Chapter 373, Florida Statutes (F.S.), and the Rules contained in Chapters 40D-4 and 40, Florida Administrative Code (F.A.C.). The permit authorizes the Permittee to proceed with the construction of a surface water management system in accordance with the information outlined herein and shown by the application, approved drawings, plans, specifications, and other documents, attached hereto and kept on file at the Southwest Florida Water Management District (District). Unless otherwise stated by permit specific condition, permit issuance constitutes certification of compliance with state water quality standards under Section 401 of the Clean Water Act, 33 U.S.C. 1341. All construction, operation and maintenance of the surface water management system authorized by this permit shall occur in compliance with Florida Statutes and Administrative Code and the conditions of this permit.

**PROJECT NAME:** Cape Haze Dockside

**GRANTED TO:** Peter Johnson  
25 Cape Haze Drive  
Placida, FL 33946

**ABSTRACT:** This permit authorizes the construction of a surface water management system designed to serve a multi-family residential development on Placida Road (CR 775 ) west of Green Dolphin Drive in Charlotte County. Construction includes nine residential buildings, roadways, clubhouse, and a wet detention pond to provide water quality treatment for the project. The method of treatment is Alternate 1 Wet Detention. No attenuation is provided as discharge is into unrestricted tidal waters. There is no freshwater floodplain in the project area. This permit also authorizes the construction of eight boat slips with lifts in the adjacent 0.22 acre non-sovereign submerged canal. A boat ramp constructed on the property without approval will be abandoned in place and the area restored to grade. There are two isolated wetlands, less than 0.50 acre within the project boundary. These wetlands will be permanently impacted. Wetland mitigation will not be required for this wetland pursuant to Subsection 3.2.2.1 Basis of Review (B.O.R.).

**OP. & MAINT. ENTITY:** Peter Johnson

**COUNTY:** Charlotte

**SEC/TWP/RGE:** 34/41S/20E and 3/42S/20E

**TOTAL ACRES OWNED  
OR UNDER CONTROL:** 11.30

**PROJECT SIZE:** 11.30 Acres

**LAND USE:** Residential

**DATE APPLICATION FILED:** April 12, 2004

**AMENDED DATE:** January 10, 2005

Permit No.: 44026926.000

Page 2

March 11, 2005

## I. Water Quantity/Quality

POND NO.	AREA ACRES @ TOP OF BANK	TREATMENT TYPE
1	1.44	Wet Detention
TOTAL	1.44	

A mixing zone is not required.  
A variance is not required.

## II. 100-Year Floodplain

Comments: The project area does not lie within a FEMA 100-year floodplain.

## III. Environmental Considerations

**Wetland Information:**

Comments: Two less than 0.50 acre isolated wetlands totaling 0.18 acre are located within the project boundary. These wetlands will be permanently impacted. There is also a 0.22 acre non-sovereign submerged canal within the project area.

**Mitigation Information:**

Comments: Wetland mitigation will not be required for the permanent wetland impacts pursuant to Subsection 3.2.2.1 B.O.R.

Watershed Name: South Coastal Drainage

A regulatory conservation easement is not required.

A proprietary conservation easement is not required.

**SPECIFIC CONDITIONS**

1. If the ownership of the project area covered by the subject permit is divided, with someone other than the Permittee becoming the owner of part of the project area, this permit shall terminate, pursuant to Section 40D-1.6105, F.A.C. In such situations, each land owner shall obtain a permit (which may be a modification of this permit) for the land owned by that person. This condition shall not apply to the division and sale of lots or units in residential subdivisions or condominiums.
2. Unless specified otherwise herein, two copies of all information and reports required by this permit shall be submitted to:

Sarasota Regulation Department  
Southwest Florida Water Management District  
6750 Fruitville Road  
Sarasota, FL 34240-9711

The permit number, title of report or information and event (for recurring report or information submittal) shall be identified on all information and reports submitted.

Permit No.: 44026926.000

Page 3

March 11, 2005

3. The Permittee shall retain the design engineer, or other professional engineer registered in Florida, to conduct on-site observations of construction and assist with the as-built certification requirements of this project. The Permittee shall inform the District in writing of the name, address and phone number of the professional engineer so employed. This information shall be submitted prior to construction.
4. The District reserves the right, upon prior notice to the Permittee, to conduct on-site research to assess the pollutant removal efficiency of the surface water management system. The Permittee may be required to cooperate in this regard by allowing on-site access by District representatives, by allowing the installation and operation of testing and monitoring equipment, and by allowing other assistance measures as needed on site.
5. The operation and maintenance entity shall submit inspection reports in the form required by the District, in accordance with the following schedule.

For systems utilizing retention or wet detention, the inspections shall be performed two (2) years after operation is authorized and every two (2) years thereafter.

6. The removal of littoral shelf vegetation (including cattails) from wet detention ponds is prohibited unless otherwise approved by the District. Removal includes dredging, the application of herbicide, cutting, and the introduction of grass carp. Any questions regarding authorized activities within the wet detention ponds shall be addressed to the District's Surface Water Regulation Manager, Sarasota Service Office.
7. Manatee protection during construction shall be provided by the following:
  - a. The Permittee shall instruct all personnel associated with the project of the potential presence of manatees and the need to avoid collisions with manatees. All construction personnel are responsible for monitoring water-related activities to determine the presence of manatee(s).
  - b. The Permittee shall advise all construction personnel that there are civil and criminal penalties for harming, harassing, or killing manatees which are protected under the Marine Mammal Protection Act of 1972, The Endangered Species Act of 1973, and the Florida Manatee Sanctuary Act.
  - c. Turbidity barriers shall be made of material in which manatees cannot become entangled, properly secured, and regularly monitored to avoid manatee entrapment. Barriers must not block manatee entry to or exit from essential habitat.
  - d. All vessels associated with the construction project shall operate at "no wake/idle" speeds at all times while in the construction area and while in water where the draft of the vessel provides less than a four-foot clearance from the bottom. All vessels will follow routes of deep water whenever possible.
  - e. If manatee(s) are seen within 100 yards of the active construction/dredging operation or vessel movement, all appropriate precautions shall be implemented to ensure protection of the manatee. These precautions shall include the operation of all moving equipment no closer than 50 feet of a manatee. Any equipment closer than 50 feet of a manatee must immediately cease operation. Activities will not resume until the manatee(s) has departed the project area of its own volition.
  - f. Any collision with or injury to a manatee shall be reported immediately to the Florida Fish and Wildlife Conservation Commission's Hotline at 1-888-404-FWCC. Collision or injury should also be reported to the U.S. Fish and Wildlife Service in Jacksonville (1-904-232-2580) for north Florida or Vero Beach (1-561-562-3909) for south Florida.



Permit No.: 44026926.000

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- g. Temporary signs concerning manatees shall be posted prior to and during all construction/dredging activities. All signs shall be removed by the Permittee upon completion of the project. A sign measuring at least 3 feet by 4 feet, which reads "Caution: Manatee Area" must be posted in a location prominently visible to water related construction crews. A second sign must be posted if vessels are associated with the construction, and must be visible to the vessel operator. The second sign must be at least 8 ½ inches by 11 inches which reads "Caution: Manatee Habitat. Idle speed is required if operating a vessel in the construction area. Any equipment closer than 50 feet of a manatee must immediately cease operation. Any collision or injury to a manatee shall be reported immediately to the Florida Fish and Wildlife Conservation Commissions' Hotline at 1-888-404-FWCC (1-888-404-3922)."
8. Permanent manatee warning and information signs ("Manatee Basics for Boaters" and "West Indian Manatee Fact Sheet") shall be installed (facing land) and maintained at boat docks prior to beneficial use or operation of that facility(ies). The Permittee shall contact the Florida Department of Environmental Protection, Division of Marine Resources, Protected Species Management (3900 Commonwealth Boulevard, Tallahassee, Florida 32399) for manatee warning and information sign location requirements. Manatee Warning and Information signs and pilings shall be maintained, in a manner acceptable to the District, for the life of the facility(ies) by the Permittee or the operation and maintenance entity.
9. This permit is issued based upon the design prepared by the Permittee's consultant. If at any time it is determined by the District that the Conditions for Issuance of Permits in Rules 40D-4.301 and 40D-4.302, F.A.C., have not been met, upon written notice by the District, the Permittee shall obtain a permit modification and perform any construction necessary thereunder to correct any deficiencies in the system design or construction to meet District rule criteria. The Permittee is advised that the correction of deficiencies may require re-construction of the surface water management system and/or mitigation areas.
10. The boat lifts shown on Sheet 2 of 5 shall be installed concurrent with the use of the boat slip. The biannual recertification report shall provide a status of the number of existing boat lifts in the canal until such time as all eight lifts are in place.
11. If, in the future, the residential units are sold individually, a property owners association shall be formed to maintain and operate the surface water management system. The Property Owner Association documents shall be submitted and approved by the District prior to any unit sales.
12. Watercraft that is part of, associated with, or a member of this project using the canal shall not have a propeller depth that exceeds 18 inches. If, in the future, a property owners association shall be formed, this watercraft propeller depth restriction shall be included within the Homeowners Association documents, general use restrictions.
13. The boat ramp shown on Sheet 2 of 5 shall be removed and the area restored in accordance with the approved construction drawings received on December 7, 2004, from Coastal Engineering Consultants, Inc. within the time frames required by Paragraph No. 16 of Consent Order SWF 04-004. Within five days of completion of removal of the boat ramp, Permittee shall submit to the District a certification by a professional engineer that the boat ramp was removed in accordance with the approved construction drawings. If upon inspection of the Property after submission of the notification, the District discovers deviations from the Permit or other violations of District rules, Permittee shall perform any necessary remedial work within 10 days of issuance of written notification by the District. Within 5 days of completion of the remedial work Permittee shall submit to the District a certification by a professional engineer that the remedial work is complete.
14. All water quality and drainage-related work and wetland mitigation construction specified in the permitted plans for the existing construction activities, shall be complete within the time frames identified in Paragraph No. 17 of Consent Order SWF 04-004.

Permit No.: 44026926.000

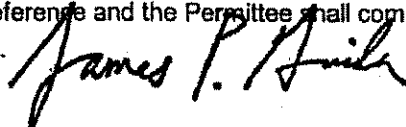
Page 5

March 11, 2005

15. As required by Paragraph No. 17 of Consent Order No. SWF 04-004, within 30 days of completion of construction under this permit, a Statement of Completion and two sets of certified as-built construction drawings shall be submitted to the District. If upon inspection of the property after submission of the as-built drawings, the District discovers deviations from the permitted design or other violations of District rules, any necessary remedial work shall be complete within 30 days of issuance of written notification by the District. A new Statement of Completion and certified as-built drawings shall be submitted if requested by the District.

**GENERAL CONDITIONS**

1. The general conditions attached hereto as Exhibit "A" are hereby incorporated into this permit by reference and the Permittee shall comply with them.



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Authorized Signature

**EXHIBIT "A"**

1. All activities shall be implemented as set forth in the plans, specifications and performance criteria as approved by this permit. Any deviation from the permitted activity and the conditions for undertaking that activity shall constitute a violation of this permit.
2. This permit or a copy thereof, complete with all conditions, attachments, exhibits, and modifications, shall be kept at the work site of the permitted activity. The complete permit shall be available for review at the work site upon request by District staff. The permittee shall require the contractor to review the complete permit prior to commencement of the activity authorized by this permit.
3. For general permits authorizing incidental site activities, the following limiting general conditions shall also apply:
  - a. If the decision to issue the associated individual permit is not final within 90 days of issuance of the incidental site activities permit, the site must be restored by the permittee within 90 days after notification by the District. Restoration must be completed by re-contouring the disturbed site to previous grades and slopes re-establishing and maintaining suitable vegetation and erosion control to provide stabilized hydraulic conditions. The period for completing restoration may be extended if requested by the permittee and determined by the District to be warranted due to adverse weather conditions or other good cause. In addition, the permittee shall institute stabilization measures for erosion and sediment control as soon as practicable, but in no case more than 7 days after notification by the District.
  - b. The incidental site activities are commenced at the permittee's own risk. The Governing Board will not consider the monetary costs associated with the incidental site activities or any potential restoration costs in making its decision to approve or deny the individual environmental resource permit application. Issuance of this permit shall not in any way be construed as commitment to issue the associated individual environmental resource permit.
4. Activities approved by this permit shall be conducted in a manner which does not cause violations of state water quality standards. The permittee shall implement best management practices for erosion and a pollution control to prevent violation of state water quality standards. Temporary erosion control shall be implemented prior to and during construction, and permanent control measures shall be completed within 7 days of any construction activity. Turbidity barriers shall be installed and maintained at all locations where the possibility of transferring suspended solids into the receiving waterbody exists due to the permitted work. Turbidity barriers shall remain in place at all locations until construction is completed and soils are stabilized and vegetation has been established. Thereafter the permittee shall be responsible for the removal of the barriers. The permittee shall correct any erosion or shoaling that causes adverse impacts to the water resources.
5. Water quality data for the water discharged from the permittee's property or into the surface waters of the state shall be submitted to the District as required by the permit. Analyses shall be performed according to procedures outlined in the current edition of Standard Methods for the Examination of Water and Wastewater by the American Public Health Association or Methods for Chemical Analyses of Water and Wastes by the U.S. Environmental Protection Agency. If water quality data are required, the permittee shall provide data as required on volumes of water discharged, including total volume discharged during the days of sampling and total monthly volume discharged from the property or into surface waters of the state.



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No. 0322 P. 9 &gt;

6. District staff must be notified in advance of any proposed construction dewatering. If the dewatering activity is likely to result in offsite discharge or sediment transport into wetlands or surface waters, a written dewatering plan must either have been submitted and approved with the permit application or submitted to the District as a permit prior to the dewatering event as a permit modification. A water use permit may be required prior to any use exceeding the thresholds in Chapter 40D-2, F.A.C.
7. Stabilization measures shall be initiated for erosion and sediment control on disturbed areas as soon as practicable in portions of the site where construction activities have temporarily or permanently ceased, but in no case more than 7 days after the construction activity in that portion of the site has temporarily or permanently ceased.
8. Off-site discharges during construction and development shall be made only through the facilities authorized by this permit. Water discharged from the project shall be through structures having a mechanism suitable for regulating upstream stages. Stages may be subject to operating schedules satisfactory to the District.
9. The permittee shall complete construction of all aspects of the surface water management system, including wetland compensation (grading, mulching, planting), water quality treatment features, and discharge control facilities prior to beneficial occupancy or use of the development being served by this system.
10. The following shall be properly abandoned and/or removed in accordance with the applicable regulations:
  - a. Any existing wells in the path of construction shall be properly plugged and abandoned by a licensed well contractor.
  - b. Any existing septic tanks on site shall be abandoned at the beginning of construction.
  - c. Any existing fuel storage tanks and fuel pumps shall be removed at the beginning of construction.
11. All surface water management systems shall be operated to conserve water in order to maintain environmental quality and resource protection; to increase the efficiency of transport, application and use; to decrease waste; to minimize unnatural runoff from the property and to minimize dewatering of offsite property.
12. At least 48 hours prior to commencement of activity authorized by this permit, the permittee shall submit to the District a written notification of commencement indicating the actual start date and the expected completion date.
13. Each phase or independent portion of the permitted system must be completed in accordance with the permitted plans and permit conditions prior to the occupation of the site or operation of site infrastructure located within the area served by that portion or phase of the system. Each phase or independent portion of the system must be completed in accordance with the permitted plans and permit conditions prior to transfer of responsibility for operation and maintenance of that phase or portion of the system to a local government or other responsible entity.
14. Within 30 days after completion of construction of the permitted activity, the permittee shall submit a written statement of completion and certification by a registered professional engineer or other appropriate individual as authorized by law, utilizing the required Statement of Completion and Request for Transfer to Operation Entity form identified in Chapter 40D-1, F.A.C. Additionally, if deviation from the approved drawings are discovered during the certification process the certification must be accompanied by a copy of the approved permit drawings with deviations noted.

15. This permit is valid only for the specific processes, operations and designs indicated on the approved drawings or exhibits submitted in support of the permit application. Any substantial deviation from the approved drawings, exhibits, specifications or permit conditions, including construction within the total land area but outside the approved project area(s), may constitute grounds for revocation or enforcement action by the District, unless a modification has been applied for and approved. Examples of substantial deviations include excavation of ponds, ditches or sump areas deeper than shown on the approved plans.
16. The operation phase of this permit shall not become effective until the permittee has complied with the requirements of the conditions herein, the District determines the system to be in compliance with the permitted plans, and the entity approved by the District accepts responsibility for operation and maintenance of the system. The permit may not be transferred to the operation and maintenance entity approved by the District until the operation phase of the permit becomes effective. Following inspection and approval of the permitted system by the District, the permittee shall request transfer of the permit to the responsible operation and maintenance entity approved by the District, if different from the permittee. Until a transfer is approved by the District, the permittee shall be liable for compliance with the terms of the permit.
17. Should any other regulatory agency require changes to the permitted system, the District shall be notified of the changes prior to implementation so that a determination can be made whether a permit modification is required.
18. This permit does not eliminate the necessity to obtain any required federal, state, local and special District authorizations including a determination of the proposed activities' compliance with the applicable comprehensive plan prior to the start of any activity approved by this permit.
19. This permit does not convey to the permittee or create in the permittee any property right, or any interest in real property, nor does it authorize any entrance upon or activities on property which is not owned or controlled by the permittee, or convey any rights or privileges other than those specified in the permit and Chapter 40D-40, F.A.C.
20. The permittee shall hold and save the District harmless from any and all damages, claims, or liabilities which may arise by reason of the activities authorized by the permit or any use of the permitted system.
21. Any delineation of the extent of a wetland or other surface water submitted as part of the permit application, including plans or other supporting documentation, shall not be considered binding unless a specific condition of this permit or a formal determination under section 373.421(2), F.S., provides otherwise.
22. The permittee shall notify the District in writing within 30 days of any sale, conveyance, or other transfer of ownership or control of the permitted system or the real property at which the permitted system is located. All transfers of ownership or transfers of a permit are subject to the requirements of Rule 40D-4.351, F.A.C. The permittee transferring the permit shall remain liable for any corrective actions that may be required as a result of any permit violations prior to such sale, conveyance or other transfer.
23. Upon reasonable notice to the permittee, District authorized staff with proper identification shall have permission to enter, inspect, sample and test the system to insure conformity with District rules, regulations and conditions of the permits.
24. If historical or archaeological artifacts are discovered at any time on the project site, the permittee shall immediately notify the District and the Florida Department of State, Division of Historical Resources.
25. The permittee shall immediately notify the District in writing of any previously submitted information that is later discovered to be inaccurate.

**ERP General Conditions**  
**Individual (Construction, Conceptual, Mitigation Banks), General,**  
**Incidental Site Activities, Minor Systems**

Nov. 1. 2007 2:26PM

No. 0322 P. 11

ORD

Table 1. Wetlands Report	
PROJECT NAME:	Cape Haze Dockside
PERMIT NUMBER	44028926.000
COUNTY	Charlotte
PROPOSED LAND USE	Residential
TOTAL PROJECT ACREAGE	11.30
TOTAL WETLAND ACREAGE	0.00
WETLAND ACREAGE NOT IMPACTED	0.00
WETLAND ACREAGE TEMPORARILY DISTURBED	0.00
WETLAND ACREAGE PERMANENTLY DESTROYED	0.00
WETLAND ACREAGE CREATED/RESTORED	0.00
WETLAND ACREAGE NET CHANGE	0.00
WETLAND ACREAGE ENHANCED	0.00
OTHER MITIGATION ACREAGE	0.00

Nov. 1, 2007 2:26PM

No. 0322 P. 12



An Equal Opportunity Employer

# Southwest Florida Water Management District

**Bartow Service Office**  
170 Century Boulevard  
Bartow, Florida 33830-7700  
(863) 534-1448 or  
1-800-432-7882 (FL only)  
SUNCOM 572-8200

**Lebanon Service Office**  
Suite 226  
3800 West Sovereign Path  
Lebanon, Florida 34461-8070  
(352) 527-8131  
SUNCOM 687-9271

2379 Broad Street, Brooksville, Florida 34604-6899  
(352) 796-7211 or 1-800-423-1476 (FL only)  
SUNCOM 628-4150 TDD only 1-800-231-6103 (FL only)  
On the Internet at: WaterMatters.org

**Sarasota Service Office**  
6750 Fruitville Road  
Sarasota, Florida 34240-9711  
(941) 377-3722 or  
1-800-320-3503 (FL only)  
SUNCOM 531-6900

**Tampa Service Office**  
7501 Highway 301 North  
Tampa, Florida 33637-6759  
(813) 986-7481 or  
1-800-836-0787 (FL only)  
SUNCOM 576-2070

**Takeedge G. "Jerry" Rice**  
Chair, Pasco

**Judith G. Whitehead**  
Vice Chair, Hernando

**Nell Conkles**  
Secretary, Polk

**Jennifer E. Diachary**  
Treasurer, Hillsborough

**Edward M. O'Brien**  
Manatee

**Thomas G. Doherty**  
Sarasota

**Neddi B. McGee**  
Hillsborough

**Sally Parke**  
Pinellas

**Yvett Prosser**  
Pinellas

**Maritta Rovira-Portao**  
Hillsborough

**Patsy C. Symons**  
DeSoto

**David L. Moore**  
Executive Director  
**William S. Blenky**  
General Counsel

August 9, 2006

**Peter Johnson and**  
**Sandra Johnson**  
25 Cape Haze Drive  
Cape Haze, FL 33946-2213

**Subject: Notice of Final Agency Action - Approval**  
**Modification of Permit by Letter**  
**Project Name:** Cape Haze Dockside  
**Permit No:** 44026926.002  
**County:** Charlotte  
**Sec/Twp/Rge:** 34/41S/20E and 3/42S/20E  
**Letter Received:** June 23, 2006  
**Expiration Date:** March 11, 2005

**References:** Chapters 40D-4 and 40, Florida Administrative Code (F.A.C.)  
Sections 373.4141 and 120.60, Florida Statutes (F.S.)

Dear Mr. and Ms. Johnson:

Your request to modify Permit No. 44026926.000 by letter has been approved. This modification authorizes:

1. Replacement of Specific Condition Nos. 13 and 14 with the following Specific Conditions:
  13. The boat ramp shown on Sheet 2 of 5 shall be removed and the area restored in accordance with the approved construction drawings received on December 7, 2004, from Coastal Engineering Consultants, Inc. within 90 days from the date of the issuance of the Army Corps of Engineers Nationwide Permit 32 for this project. Within five days of completion of removal of the boat ramp, Permittee shall submit to the District a certification by a professional engineer that the boat ramp was removed in accordance with the approved construction drawings. If upon inspection of the Property after submission of the notification, the District discovers deviations from the Permit or other violations of District rules, Permittee shall perform any necessary remedial work within 10 days of issuance of written notification by the District. Within 5 days of completion of the remedial work Permittee shall submit to the District a certification by a professional engineer that the remedial work is complete.
  14. All water quality and drainage-related work and wetland mitigation construction specified in the permitted plans for the existing construction activities, shall be complete within 90 days from the date of the issuance of the Army Corps of Engineers Nationwide Permit 32 for this project.
2. The addition of the following Specific Condition:
  16. The Permittee shall submit a copy of the Army Corps of Engineers Nationwide Permit 32 issued for Cape Haze Dockside to the Sarasota Service Office of the Southwest Florida Water Management within 14 day of issuance.

Nov. 1, 2007 2:26PM

No. 0522 2, 13

Permit No.: 44026926.002

Page 2 of 2

August 9, 2006

3. All other terms and conditions of Permit No. 44026926.000, dated March 11, 2006, and entitled Cape Haze Dockside, apply.

Plans and information you submitted to support your request to modify this permit will be kept on file.

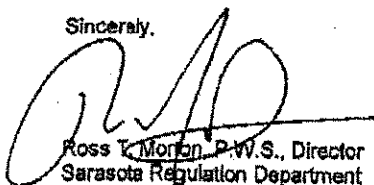
Final approval is contingent upon no objection to the District's action being received by the District within the time frames described below.

You or any person whose substantial interests are affected by the District's action regarding a permit may request an administrative hearing in accordance with Sections 120.569 and 120.57, Florida Statute, (F.S.), and Chapter 28-106, Florida Administrative Code, (F.A.C.), of the Uniform Rules of Procedure. A request for hearing must: (1) explain how the substantial interests of each person requesting the hearing will be affected by the District's action, or proposed action, (2) state all material facts disputed by the person requesting the hearing or state that there are no disputed facts, and (3) otherwise comply with Chapter 28-106, F.A.C. Copies of Sections 28-106.201 and 28-106.301, F.A.C. are enclosed for your reference. A request for hearing must be filed with (received by) the Agency Clerk of the District at the District's Brooksville address within 21 days of receipt of this notice. Receipt is deemed to be the fifth day after the date on which this notice is deposited in the United States mail. Failure to file a request for hearing within this time period shall constitute a waiver of any right you or such person may have to request a hearing under Sections 120.569 and 120.57, F.S. Mediation pursuant to Section 120.573, F.S., to settle an administrative dispute regarding the District's action in this matter is not available prior to the filing of a request for hearing.

Enclosed is a "Noticing Packet" that provides information regarding the District Rule 40D-1.1010, F.A.C., which addresses the notification of persons whose substantial interests may be affected by the District's action in this matter. The packet contains guidelines on how to provide notice of the District's action, and a notice that you may use.

If you have questions regarding this letter modification, please contact Daryl R. Platt, P.E., at the Sarasota Service Office, extension 6508.

Sincerely,



Ross T. Morton, P.W.S., Director  
Sarasota Regulation Department

RTM:DRF:bxm

Enclosure: Noticing Packet (42.00-039)  
Sections 28-106.201 and 28-106.301, F.A.C.

cc: File of Record 44026926.002  
Lucy Blair, FDEP  
Clayton R. Miller, P.E., Coastal Engineering Consultants, Inc.  
Kristina Rudman Ramsey, Broad and Cassel Attorneys at Law  
MaryBeth McNeil, Office of General Counsel

Nov. 1, 2007 2:23PM

No. 0522 P. 14

## CERTIFICATE OF MAILING

I hereby certify that a copy of the FAA letter on Application No. 44026926.002 was mailed by United States Mail to the below listed parties this August 9, 2006.

FAA Expiration Date: September 4, 2006

Permittee/Owner

Peter Johnson and  
Sandra Johnson  
25 Cape Haze Drive  
Cape Haze, FL 33946-2213

Agency Action Party

Lucy Blair  
FDEP  
28000A-10 Airport Road  
Punta Gorda, FL 33982

Engineer/Consultant

Clayton R. Miller, P.E.  
Coastal Engineering Consultants,  
Inc.  
3108 South Horseshoe Drive  
Naples, FL 34104

Engineer/Consultant

Kristina Rudman Ramsey  
Broad and Cassel Attorneys at Law  
390 North Orange Avenue, Suite  
1400  
Orlando, FL 32801

Required Noticing: (w/ Letter & Copy of the Permit)	See USACOE address above, if applicable
Documents sent by Regular US Mail to Permittee/Consultant	Sections 28-106.201 and 28-106.301, F.A.C. Noticing Packet Approved Construction Drawings (Permittee only) Statement of Completion (Permittee only) Notice of Authorization (Permittee only)
Documents sent by Regular US Mail to FAA Requestors and others	Sections 28-106.201 and 28-106.301, F.A.C.

- ( ) ERP - Eminent Domain Property Owners (EPOs) mailed regular U.S. Mail (see list)  
( ) WRP - Adjacent Waterfront Property Owners (AWPOs) if requested



Administrative Section  
Sarasota Regulation Department





## Southwest Florida Water Management District

**Bartow Service Office**  
170 Century Boulevard  
Bartow, Florida 33830-7700  
(883) 534-1448 or  
1-800-492-7662 (FL only)  
SUNCOM 572-6200

**Leesato Service Office**  
Suite 228  
3800 West Sovereign Path  
Leesato, Florida 34481-8070  
(352) 827-8131  
SUNCOM 867-3271

2379 Broad Street, Brooksville, Florida 34604-6899  
(352) 796-7211 or 1-800-423-1476 (FL only)  
SUNCOM 628-4150 TDD only 1-800-231-6103 (FL only)  
On the Internet at: [WaterMatters.org](http://WaterMatters.org)

**Sarasota Service Office**  
6750 Fruitville Road  
Sarasota, Florida 34240-9711  
(941) 377-3722 or  
1-800-320-3503 (FL only)  
SUNCOM 531-6900

**Tampa Service Office**  
7601 Highway 301 North  
Tampa, Florida 33637-8759  
(813) 885-7481 or  
1-800-838-0797 (FL only)  
SUNCOM 578-2070

**Talmadge H. "Jerry" Rice**  
Chair, Pasco  
**Joel O. Whitehead**  
Vice Chair, Hernando  
**Neil Conlee**  
Secretary, Polk  
**Jennifer L. Glasshey**  
Treasurer, Hillsborough  
**Edward W. Chance**  
Manatee  
**Thomas S. Doherty**  
Sarasota  
**Heidi M. McGee**  
Hillsborough  
**Salvo Parks**  
Pinellas  
**Todd Presum**  
Pinellas  
**Marissa Rivas-Porino**  
Hillsborough  
**Pete G. Symons**  
DeSoto

**David L. Moore**  
Executive Director  
**William S. Blanksy**  
General Counsel

August 17, 2006

Peter Johnson and  
Sandra Johnson  
25 Cape Haze Drive  
Cape Haze, FL 33946-2213

**Subject: Corrected Permit**  
**Project Name: Cape Haze Dockside**  
**Permit No.: 44026926.002**  
**County: Charlotte**  
**Sec/Twp/Rge: 34/41S/20E and 3/42S/20E**

Dear Mr. and Ms. Johnson:

District staff have discovered an error in the permit issued to you on August 9, 2006. The expiration date was incorrectly listed at March 11, 2005. Please note that the expiration date of your permit is March 11, 2010.

Please attach this letter to your permit packet.

We hope that this error has not caused an inconvenience for you. If you have questions, please contact our office.

Sincerely,

Ross T. Morton, P.W.S., Director  
Sarasota Regulation Department

RTM:DRF:esw

cc: File of Record 44026926.002  
Lucy Blair, FDEP  
Clayton R. Miller, P.E., Coastal Engineering Consultants, Inc.  
Kristina Rudman Ramsey, Broad and Cassel Attorneys at Law

## **Exhibit C**

### **Nationwide Permit**





DEPARTMENT OF THE ARMY  
JACKSONVILLE DISTRICT CORPS OF ENGINEERS  
701 SAN MARCO BOULEVARD  
JACKSONVILLE, FLORIDA 32207

REPLY TO  
ATTENTION OF

Regulatory Division  
Special Projects Branch  
Enforcement Section  
SAJ-2003-11215 (NW-32)

December 15, 2007

Mr. David Arp  
c/o Steven Burton, P.A.  
Broad and Cassel  
Counsel for Mr. David Arp  
100 North Tampa Street, Suite 3500  
Tampa, Florida 33602

Triple Diamond Enterprises, LLC  
c/o William A. Dooley, Esquire  
Dooley and Drake, P.A.  
Counsel for Triple Diamond Enterprises, LLC  
1432 First Street  
Sarasota, Florida 34236

Dear Gentlemen:

Pursuant to the Consent Decree in Civil Action No. 90-5-1-1-17895 ("Consent Decree"), the Department of the Army has assigned this matter permit application number SAJ-2003-11215. A review of the information provided in the Consent Decree shows the following proposed discharges of dredged or fill material: 1) those discharges of dredged or fill material specifically reflected on the Location Map Site Plan and Wetland Restoration/Enhancement Area Planting Plan dated January 2006 and attached as Exhibit A to the Consent Decree, 2) such other discharges as may be necessary to complete the obligations of Mr. David Arp and Triple Diamond Enterprises, LLC pursuant to the Consent Decree, and 3) any discharges that may be necessary to meet the affirmative obligations of Mr. David Arp and Triple Diamond Enterprises, LLC in Southwest Florida Water Management District Environmental Resource Permit No. 44026926.000, issued on March 11, 2005, and as modified by letter dated August 9, and

August 17, 2006 and as attached as Composite Exhibit B to the Consent Decree. The project is located in Englewood, Charlotte County, Florida.

Your project, as depicted on the drawings attached as exhibits to the Consent Decree, is authorized by Nationwide Permit (NWP) Number 32. This verification is valid until May 30, 2009. This verification is subject to the following special conditions, the attached general conditions and the provisions of the Consent Decree above. Special Conditions:

1. Within 60 days of completion of the work authorized, the attached "Self-Certification Statement of Compliance" must be completed and submitted to the U.S. Army Corps of Engineers. Mail the completed form to the Regulatory Division, Enforcement Section, Post Office Box 4970, Jacksonville, Florida 32232-0019.

2. The Permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of structures or works in or affecting navigable waters of the United States, regulated pursuant to Section 10 of the Rivers and Harbors Act of 1899, and herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structures or works shall cause unreasonable obstruction to the free navigation of the navigable waters, the Permittee will be required, upon due notice from the U.S. Army Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

3. The Permittee shall, within 30 days from the date of this letter of authorization, execute and record the deed restriction made part of the aforementioned consent decree as Exhibit E in the office of the Circuit Clerk of Charlotte County, Florida. Within 90 days from the date of this letter of authorization, the Permittee shall provide written proof of recording to the Corps of Engineers. Such proof shall consist of a photocopy of the recorded document showing the book and page where recorded and the date of recording.

4. This letter of authorization does not obviate the necessity to obtain any other Federal, State, or local permits, which may be required. In Florida, projects qualifying for this NWP must be authorized under Part IV of Chapter 373 by the Department of Environmental Protection, a water management

district under §. 373.069, F.S., or a local government with delegated authority under §. 373.441, F.S., and receive Water Quality Certification (WQC) and Coastal Zone Consistency Concurrence (CZCC) (or a waiver), as well as any authorizations required by the State for the use of sovereignty submerged lands. You should check State-permitting requirements with the Florida Department of Environmental Protection or the appropriate water management district.

This letter does not give absolute Federal authority to perform the work as specified in the Consent Decree and attachments. The proposed work may be subject to local building restrictions mandated by the National Flood Insurance Program. You should contact your local office that issues building permits to determine if your site is located in a flood-prone area, and if you must comply with the local building requirements mandated by the National Flood Insurance Program.

If you are unable to access the internet or require a hardcopy of any of the conditions, limitations, or expiration date for the above referenced NWP, please contact Eric Summa, Chief, Enforcement Section, by telephone at 904-232-1665.

Sincerely,

A handwritten signature in black ink, appearing to read 'Paul L. Grosskruger', written in a cursive style.

for:

Paul L. Grosskruger  
Colonel, U.S. Army  
District Commander

GENERAL CONDITIONS  
33 CFR PART 320-330

PUBLISHED FEDERAL REGISTER DATED 13 NOVEMBER 1986

1. The time limit for completing the work authorized ends on November 30, 2009. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.
2. You must maintain the activity authorized by this permit in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.
3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.
4. If you sell the property associated with this permit you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.
5. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.
6. You must allow a representative from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

SELF-CERTIFICATION STATEMENT OF COMPLIANCE

Permit Number: NW-32

Application Number: SAJ-2003-11215

Permittees' Names & Addresses (please print or type): \_\_\_\_\_

\_\_\_\_\_

Telephone Number: \_\_\_\_\_

Location of the Work: \_\_\_\_\_

\_\_\_\_\_

Date Work Started: \_\_\_\_\_ Date Work Completed: \_\_\_\_\_

Description of the Work (e.g., bank stabilization, residential or commercial filling, docks, dredging, etc.): \_\_\_\_\_

\_\_\_\_\_

Acreage or Square Feet of Impacts to Waters of the United States: \_\_\_\_\_

\_\_\_\_\_

Describe Mitigation completed (if applicable): \_\_\_\_\_

\_\_\_\_\_

Describe any Deviations from Permit (attach drawing(s) depicting the deviations): \_\_\_\_\_

\_\_\_\_\_

\*\*\*\*\*

I certify that all work, and mitigation (if applicable) was done in accordance with the limitations and conditions as described in the permit. Any deviations as described above are depicted on the attached drawing(s).

\_\_\_\_\_  
Signature of Permittee

\_\_\_\_\_  
Date

DEPARTMENT OF THE ARMY PERMIT TRANSFER REQUEST

-2-

PERMIT NUMBER: 2003-11215

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. Although the construction period for works authorized by Department of the Army permits is finite, the permit itself, with its limitations, does not expire.

To validate the transfer of this permit and the associated responsibilities associated with compliance with its terms and conditions, have the transferee sign and date below and mail to the U.S. Army Corps of Engineers, Enforcement Branch, Post Office Box 4970, Jacksonville, FL 32232-0019.

(TRANSFEREE-SIGNATURE) \_\_\_\_\_

(SUBDIVISION) \_\_\_\_\_

(DATE) \_\_\_\_\_

(LOT) \_\_\_\_\_

(BLOCK) \_\_\_\_\_

(NAME-PRINTED) \_\_\_\_\_

(STREET ADDRESS) \_\_\_\_\_

(MAILING ADDRESS) \_\_\_\_\_

(CITY, STATE, ZIP CODE) \_\_\_\_\_

## **Exhibit D**

# **Cape Haze Dockside Wetland Mitigation Proposal**





March 23, 2006

Mr. Eric Summa  
US Army Corps of Engineers  
Jacksonville District  
PO Box 4970  
Jacksonville, Florida 32232-0019

**RE: Cape Haze Dockside  
Wetland Mitigation Proposal**

Dear Mr. Summa,

E Co Consultants, Inc. (E Co) has prepared the following Wetland Mitigation Proposal to offset the discharge of dredged or fill material to wetlands on the above referenced site.

The discharge of dredged or fill material occurred within approximately 2.2 acres delineated by Joe Batchelor, US Army Corps of Engineers (Corps) as wetlands on February 17, 2005. There were approximately 0.32 acres of Corps delineated wetlands which did not have any evidence of a discharge. Please see the project drawings prepared by Coastal Engineering depicting these areas.

In order to compensate for the discharges to wetlands, we have evaluated the potential for on-site as well as off-site mitigation. On-site mitigation credits will be generated through the enhancement of the remaining 0.32 acre wetland area and the restoration of 0.12 acres of additional wetland area. The enhancement area currently contains mostly nuisance/exotic vegetation including punk tree and Brazilian pepper. Its hydrology has also been isolated from an off-site wetland by a berm at the property line. Enhancement of this wetland will include the removal of all nuisance/exotic vegetation from the wetland area and the planting of appropriate desirable hydrophytic plants. The wetland restoration area is currently a berm, which isolates the enhancement area from off-site wetlands to the west. This berm will be removed, to reconnect the on-site and off-site wetlands. In addition, this area will be planted with appropriate desirable hydrophytic plants. By accomplishing these activities, the wetlands vegetative and hydrologic functions will be improved. Please see the project drawings prepared by Coastal Engineering for details on the proposed wetland enhancement and restoration.

Following the initial wetland enhancement and restoration, monitoring will be initiated to ensure success. A baseline monitoring event to document the enhancement and restoration activities will be accomplished within 30-days follow the completion of work. This event will include photographs taken from fixed-point photo stations, quantities and species of the installed plant material, and a qualitative description of the condition of the areas including the hydrology. After the baseline monitoring, a monitoring program, including two events per year, will be initiated. One event will occur in the wet season and one event will occur in the dry season. Each monitoring event will include photographs

1523 8<sup>th</sup> Avenue West, Suite B, Palmetto FL 34221 -- Telephone 941.722.0901 Fax 941.722.4931  
7357 International Place, Suite 107, Sarasota FL 34240 -- Telephone 941.388.0505 Fax 941.373.6796  
233 East Park Avenue, Suite 101, Lake Wales FL 33853 -- Telephone 863.676.8996 Fax 863.676.9897  
[www.ecoconsultants.net](http://www.ecoconsultants.net)

**Cape Haze Dockside  
Wetland Mitigation Proposal**  
March 23, 2006  
Page 2

taken from fixed-point photo stations, a qualitative descriptions of coverage by wetland, upland, and nuisance vegetation, a description of the hydrology, and documentation of maintenance in the areas. An annual report will be compiled including the information from both monitoring events. Monitoring will occur for a 3-year period or until the enhancement and restoration areas have a coverage of desirable hydrophytic vegetation greater than 85% and a coverage of nuisance/exotic vegetation less than 5%.

Maintenance for the removal of nuisance/exotic vegetation will be accomplished in the enhancement and restoration areas using manual methods. It will occur at an interval necessary to limit nuisance/exotic vegetation growing in the areas to less than 5%.

In order to determine the amount of on-site mitigation credit, we have prepared the attached Uniform Mitigation Assessment Method (UMAM) study. The Relative Functional Gain (RFG) from the proposed on-site wetland enhancement is 0.23. Given the size of the wetland enhancement and restoration areas, which total 0.44 acres, the mitigation credit derived from the on-site wetland enhancement will be 0.1 acres. This leaves a deficit of 2.1 acres of Corps jurisdictional wetland impact, to be mitigated off-site.

Off-site mitigation will be provided through the purchase of credits in the Little Pine Island Mitigation Bank (Mitigation Bank). This decision was made following the evaluation of performing off-site mitigation on the adjacent State owned park. It was discovered during discussions with Florida Park Service staff during a meeting on March 2, 2006 that mitigation work originally proposed in the park (removal of a berm separating a wetland from a canal) may jeopardize a grant awarded for improvements to the park which included the berm removal. As a result, it was decided to pursue credits in the Mitigation Bank instead.

To initiate the process, we have contacted the Mitigation Bank and received the necessary documentation to evaluate the feasibility of purchasing credits to offset Corps jurisdictional impacts on the Cape Haze Dockside project site. The evaluation process contains three steps. These include (1) the determination that the impact site wetlands are of a similar type to those within the Bank; (2) the determination that the impact site is within the Bank's service area; and (3) a functional assessment of the wetland impact site. This process is described in the attached document, *Little Pine Island Wetland Mitigation Bank: A Functional Assessment Procedure for Wetland Impact Sites*.

The evaluation of the wetland area with regard to the above parameters is based on our knowledge of the wetland's pre-impact condition established prior to the most recent clearing activities. During two site visits in 2001, we observed wetland areas containing a mono-culture of punk trees in the central and southern portions of the property.

The wetland impacted on the subject parcel was typical of a disturbed coastal marsh, which had converted from herbaceous vegetation to punk tree as a result of the disturbance. This wetland type is very similar to the original condition of restored herbaceous marshes within the Mitigation Bank, which were also infested with punk tree. As such, the wetland impact site on the subject property meets criteria one.

**Cape Haze Dockside  
Wetland Mitigation Proposal**  
March 23, 2006  
Page 3

The Mitigation Bank service area includes portions of coastal Collier, Lee, Charlotte, and Sarasota Counties inland from the coast to the 100-year floodplain. Our project site falls within the boundaries of the service area. Please see the attached document, *Little Pine Island Wetland Mitigation Bank: A Functional Assessment Procedure for Wetland Impact Sites* for a map of the Mitigation Bank's service area.

Step three includes a functional assessment of the Corps jurisdictional wetland impact site. This functional assessment contains nine wetland functions which are scored for 0 to 1 as compared to a reference wetland. A score of 0 indicates no function and a score of 1 indicates perfect function.

The wetland impact site on the subject parcel was highly degraded. It contained a dominance of nuisance/exotic vegetation and provided little or no habitat for wetland dependent wildlife species. This lack of function is reflected in the functional assessment. The following table contains the functional assessment scores for the nine wetland function parameters. Please note as mentioned above, that this functional assessment is based on our pre-impact wetland condition observations during site visits performed in 2001.

WETLAND FUNCTION	Wetland Functional Capacity Score
Habitat for Wetland Dependent Species	0.3
Support of Food Chains	0.4
Support of Native Plant Populations	0
Maintenance of Biological Integrity	0.5
Provision of Landscape Heterogeneity	0.3
Access to Aquatic Refugia	0.3
Maintenance of Natural Hydrologic Regimes	0.5
Maintenance of Water Quality	0.5
Support of Soil Processes	0.5
Total	3.3
Wetland Functional Capacity (Average of Above)	0.4

To determine the Mitigation Bank credits required to off-set the discharge to 2.1 acres of wetlands, the Wetland Functional Capacity is multiplied by the acreage.

$$\text{Mitigation Bank credits} = \text{Wetland Functional Capacity} \times \text{Impact Acreage} = 0.4 \times 2.1 \text{ acres} = 0.8 \text{ Credits}$$

E Co Consultants, Inc.

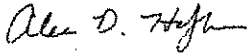
**Cape Haze Dockside  
Wetland Mitigation Proposal**  
March 23, 2006  
Page 4

Based on the functional assessment described above, the applicant will purchase 0.8 acres of freshwater marsh credits from the Mitigation Bank to offset the discharge to wetlands not otherwise mitigated for on-site by the enhancement/restoration plan.

In summary, the discharge to 2.2 acres of Corps identified wetland will be mitigated by using both on-site wetland enhancement/restoration and off-site mitigation through the purchase of credits in the Little Pine Island Mitigation Bank. The total credit derived from on-site wetland enhancement/restoration is 0.1 acres leaving 2.1 acres of wetland impact to be mitigated for off-site. Off-site mitigation will be provided by the purchase of 0.8 credits in the Little Pine Island Mitigation Bank.

If you have any questions, or require additional information, please do not hesitate to call.

Sincerely,



Alec D. Hoffner  
Senior Scientist

Attachments: Coastal Engineering Project Drawing  
UMAM  
Little Pine Island Wetland Mitigation Bank: A Functional Assessment Procedure for  
Wetland Impact Sites

F:\E Co Sarasota\Coastal Engineering\Wetland Mitigation Proposal 032306.sww

E Co Consultants, Inc.

## PART I: QUALITATIVE DESCRIPTION

Site project name: Cape Haze Dockside	Application number:	Assessment name or number: #1	
FLUCCs code: 630	Further classification (optional): PFO	Impact or mitigation site	Area: ± 0.44 ac.
Basin/watershed etc. Coastal/Placida Harbor	Affected water body (class):	Mitigation	Special classification:
Geographic relationship to and hydrologic connection with wetlands, other surface waters, uplands The enhancement wetland area is north of an excavated canal, which connects to Placida Harbor. It was most likely historically connected to an off-site wetland to the west through a flow-way.			
Assessment area description: The enhancement wetland was most likely impacted by historical dredging and clearing activities to the south and east. The vegetation was mostly comprised of a canopy of punk tree and Australian pine. The understory and subcanopy vegetation included Brazilian pepper and some saw palmetto. Its historical function was most likely palustrine herbaceous marsh.			
Significant nearby features:  The enhancement wetland is bordered to the east by single family homes, to the south by single family homes and an excavated canal, to the west by a State park, and to the north by Placida Road.		Uniqueness (considering the relative rarity in relation to the regional landscape): The enhancement area is typical of highly impacted wetland system.	
Functions: The enhancement area, due to its extremely degraded nature, appeared to have minimal wetland function in its current condition.		Mitigation for previous permit/other historic uses:  N/A	
Anticipated wildlife utilization based on literature review (list of species that are representative of the assessment area and reasonable expected to be found): It is anticipated that the area may be used by some amphibians, birds and small mammals.		Anticipated utilization by Listed species (listed species, their legal classification (E,T SSC) type of use, and intensity of use on the assessment area) It is not anticipated that the area is currently utilized by listed species..	
Observed evidence of wildlife utilization (list species directly observed or other signs such as tracks, dropping, etc): No wildlife utilization was observed during several visits to the site.			
Additional Relevant Factors:			
Assessment conducted by:  Alec Hoffner, E Co Consultants, Inc.		Assessment Date(s):  Several site visits during 2001 and January 2006	

E Co Consultants, Inc.

**PART II: QUANTIFICATION OF ASSESSMENT AREA (impact or mitigation)**

Site/Project Name: <b>Cape Haze Dockside</b>	Application number:		Assessment Area Name/Number	
Impact or Mitigation <b>Mitigation/Enhancement</b>	Assessment conducted by: <b>Alec Hoffner</b>		Enhancement Assessment date(s): <b>February 2006</b>	
Scoring guidance:	Optimal: 10	Moderate 7	Minimal 4	Not present 1
Scoring of each indicator is based on what would be suitable for the type of wetland or surface waters assessed	Condition is optimal and fully supports wetland/surface functions	Condition is less than optimal but sufficient to maintain most wetland surface water functions	Minimal level of support of wetland/surface water functions	Condition is insufficient to provide wetland/surface water functions
Location and landscape support Current 5 with 5	Location and landscape support of the wetland enhancement area, which is a portion of the ACOR wetland area, will be minimally affected by the proposed enhancement activities and development project. The area to be enhanced will be connected to the off-site park area, which will offset any negative affects of the proposed development.			
Water environment (n/a for uplands) Current 5 with 8	The connection to the off-site wetland area on the State Park will be enhanced by returning the areas west of the enhancement wetland to natural grade. This will allow the free exchange of water between the two systems.			
Community structure Current 2 with 8	The community structure will be significantly improved by the removal of nuisance exotic species growing in the wetland. Following initial treatment of nuisance/exotic vegetation, maintenance will occur at a frequency necessary to keep nuisance/exotic vegetation coverage less than five percent in the enhancement wetland.			

Score = sum of scores/10 (if upland divide by 20)	
Current	with
0.40	0.70

If preservation as mitigation:
Preservation adjustment factor =

For Impact Assessment areas
PL = delta x acres

If mitigation
Time lag (t-factor) = 1.03
Risk factor = 1.25

For mitigation assessment areas
RFG = delta / (t-factor x risk) = 0.23

Delta = (with - current)
0.30

$$\text{Mitigation Credit} = \text{RFG} \times \text{Enhancement Acreage} = 0.23 \times 0.44 \text{ acres} = 0.10 \text{ acres}$$

# **Exhibit E**

## **Restrictive Covenant**



## DECLARATION OF RESTRICTIVE COVENANTS

The Declarant, Peter Sandra Johnson, is the fee simple owner of the certain real property located in Charlotte County, Florida, as described on Exhibit A, which is attached hereto and incorporated herein by reference (the "Property"). Declarant has applied for a permit from the United States Army Corps of Engineers to fill certain wetlands [and/or construct a dock or pilings] in waters of the United States (the "Permit"). In consideration of the issuance of such a permit and in compliance with the terms thereof, and for other good and valuable consideration, the Declarant hereby declares that the Property shall henceforth be subject to the following restrictive covenants, which shall run with the land in perpetuity. As used herein, the term "Declarant" includes Peter Sandra Johnson and his/her/its successors, heirs, and assigns.

1. The Property shall be retained and maintained its natural, vegetative, hydrologic, scenic, open, agricultural, or wooded condition and to retain such areas as suitable habitat for fish, plants, or wildlife. Those wetland or upland areas that are to be restored, enhanced, or created pursuant to the Permit shall be retained and maintained in the restored, enhanced, or created condition required by the Permits.
2. The following activity on the Property is prohibited:
  - a. Construction or placing of buildings, roads, signs, billboards or other advertising, utilities, or other structures on or above the ground;
  - b. Dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste, or unsightly or offensive materials;
  - c. Removal or destruction of trees, shrubs, or other vegetation, except as may be permitted by the Permits, and except for the removal of nuisance, exotic, or non-native vegetation in accordance with a maintenance plan approved by Grantee;
  - d. Planting of nuisance, exotic, or non-native plants as listed by the Exotic Pest Plant Council (EPPC), or its successor;
  - e. Exploration for oil or gas, and excavation, dredging, or removal of loam, peat, gravel, soil, rock, or other material substance in such a manner as to affect the surface, except as may be permitted or required by the Permits;
  - f. Surface use except for purposes that permit the land or water area to remain in its natural condition;
  - g. Activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife habitat preservation including, but not limited to, ditching, diking, and fencing, except as permitted or required by the Permits;
  - h. Acts or uses detrimental to such aforementioned retention and maintenance of land or water areas;
  - i. Acts or uses detrimental to the preservation of the structural integrity or physical appearance of sites or properties of historical, architectural, archaeological, or cultural significance.

3. Grantor shall be responsible for any costs or liabilities related to the operation, upkeep, and/or maintenance of the Property consistent with these restrictive covenants. Grantor shall remove from the Property any nuisance, exotic, or non-native plants as listed by the Exotic Pest Plant Council (EPPC), or its successor.


4. Declarant shall not convey any right or allow access to the general public to any portion of the Property for any purposes whatsoever.


5. Declarant shall record these restrictive covenants in the official records of Charlotte County, Florida, and shall re-record these restrictive covenants at any time the Corps may require to preserve its rights. In the event ownership of the Property is transferred, Declarant shall provide proof to the Corps of delivery of a copy of the recorded restrictive covenants to the new owner(s), together with the notification to the Corps of permit transfer. Declarant shall pay all recording costs and taxes necessary at any time to record these restrictive covenants in the public records.

6. These restrictive covenants shall take effect immediately upon declaration and shall run with the land in perpetuity. These restrictive covenants shall be deemed to survive unity of title. Declarant will take no action to rescind, revoke, or otherwise nullify these restrictive covenants.

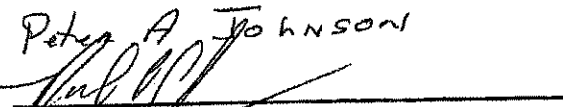
7. The terms and conditions of these restrictive covenants may be enforced by the Corps, or its successor agencies, in an action at law or equity against any person(s) or other entity/entities violating or attempting to violate these restrictive covenants. In furtherance of this right, upon reasonable notice to the property owner, the Corps may enter the above-described property in a reasonable manner and at a reasonable time to ensure compliance with these restrictive covenants. Any forbearance on the part of the Corps to exercise its rights in the event of a violation shall not be deemed or construed to be a waiver of its rights hereunder in the event of any subsequent violation. Should the Corps prevail in an enforcement action, the Corps shall be entitled to recover the cost of restoring the land to the natural vegetative and hydrologic condition existing at the time of execution of these restrictive covenants or to the vegetative and hydrologic condition required by the Permits.

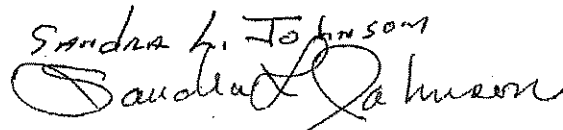
Signed in the presence of:

  
Print: TERRY S. LAWRENCE

  
Print: JULIE S. LAWRENCE

PROPERTY OWNER:

Peter A. Johnson  
By:   
Print: \_\_\_\_\_  
Title: OWNER

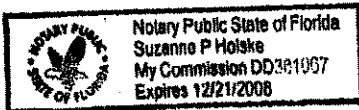
Sandra L. Johnson  


STATE OF FLORIDA

COUNTY OF Charlotte

The foregoing instrument was acknowledged before me this 16<sup>th</sup> day of June, 2004, by Peter A. Johnson as owner of The property who is personally known to me or has produced \_\_\_\_\_ as identification.

My Commission Expires: 12-21-08



Suzanne P. Holste  
NOTARY PUBLIC

